**BANK BUMIPUTRA (M) BHD.**

**v.**

**WAN AZIZ HJ. WAN ALI**

HIGH COURT MALAYA, KOTA BHARU
ABDUL MALEK AHMAD J
[ORIGINATING SUMMONS NO. 275 OF 1984]
19 APRIL 1986

***LAND LAW:*** *Charge to secure money lent - Non-payment - Application for order of sale - Should charge be enclosed with Form 16D - Section 254(1)(a) of National Land Code 1965 - Personal Service - Was it compulsory - Section 431(1)(d) of Code - Limitation of action - Section 21(1) and section 21(5) proviso (b) of Limitation Act 1953.*

The defendant on 16 August 1971 and 8 January 1972, executed charges on two lands as security for money lent by the plaintiff. The charges had been duly registered. On 23 June 1984 the defendant was served by registered post with a notice of demand dated 19 June 1984 in form 16D pursuant to the National Land Code 1965 which stated that as at 7 April 1984 he had failed to repay the plaintiff RM66,588.48 plus interest at 9% p.a. with monthly rests. The plaintiff in the current application, applied for an order of sale of the two lands charged under s. 256 of the Code.

The Counsel for the defendant argued that the order should not be granted on the following grounds:

(a) when the original application was filed, the plaintiff did not enclose the respective charges;

(b) the notice of service had not been personally served although it was not disputed that it was served on the service station owned by the defendant by registered post;

(c) the amount of RM66,000 plus in 1984 could not have gone up to RM115,372 on 13 May 1985;

(d) the claim was not made within 12 years from the date the right to receive money accrued and was therefore statute barred; and

(e) interest could not be claimed after the expiration of six years from the date it became due under sub-section (5) of s. 21 of the Limitation Act 1953.

**Held:**

**[1]** Paragraph (a) of s. 254(1) of the Code specifically required the chargee to specify only the breach in question when serving the chargor the notice in Form 16D and did not require him to enclose the respective charges, consequently it was totally devoid of merit.

**[2]** In terms of s. 431(1), para. (d) service may be made by registered post.

**[3]** The calculation of interest was in order.

**[4]** Section 21(1) of the Limitation Act 1953 provided that "no action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge ... after the expiration of twelve years from the date when the right to receive the money accrued." Section 26 of the same Act specifically stated that the right of an action to recover land or to enforce a mortgage or charge in respect of land was deemed to accrue on and not before the date of the

acknowledgement or last payment. Although the charges were executed in 1971 and 1972, the defendant's failure to repay the plaintiff began only from 7 April 1984 and the period of limitation ran from that date and not from the date of execution of the charges or the date the Form 16D notices were sent. As regards the questions of interest the same reasoning applied in the new proviso (b) of s. 21(5) of the Act which stated that interest shall not be deemed to become due before the right to receive the principal sum of money had accrued or was deemed to have accrued.

*[Order granted in terms of the application of the plaintiff.]*

**Legislation referred to:**
Limitation Act 1953, ss. 21(1), (5), (5)(b), 26
National Land Code 1965, ss. 254(1)(a), 256, 431(1)(d)

*For the plaintiff - Aziz Haniff; M/s. Wrigglesworth & Co.*
*For the defendant - S.E. Rajah; M/s. Zain & Co.*

**JUDGMENT**

**Abdul Malek Ahmad J:**

As stated in the three affidavits supporting the plaintiff's application dated respectively 12 November 1984, 11 August 1985 and 7 September 1985, the defendant had, on 16 August 1971, executed a charge on land held under Grant 6032 Lot 59 Seksyen 5 Kota Bharu to secure overdraft facilities up to RM10,000 for himself and, on 8 January 1972, executed another charge on land held under Grant 6310 Lot 11 Seksyen 24 Kota Bharu to secure repayment of money due under his current account. The charges had been registered as Charges 92/71 and 9/72 respectively.

On 23 June 1984 the defendant was served by registered post with notice of demand dated 19 June 1984 in Form 16D pursuant to the National Land Code 1965 (hereinafter "the Code") as at 7 April 1984 he had failed to repay the plaintiff RM66,588.48 plus interest at 9 percent per annum with monthly rests. The plaintiff was now applying for an order of sale by public auction of the two lands charged under s. 256 of the Code.

Learned Counsel for the defendant argued that the order should not be granted on the following grounds:

(a) when the original application was filed, the plaintiff did not enclose the respective charges;

(b) the notice of service had not been personally served although it was not disputed that it was served on the service station owned by the defendant by registered post;

(c) the amount RM66,000 plus in 1984 could not have gone up to RM115,372 on 13 May 1985;

(d) the claim was not made within 12 years from the date the right to receve the money accured and was therefore statute barred; and

(e) interest could not be claimed after the expiration of six years from the date it became due under subsection (5) of s. 21 of Limitation Act 1953 (hereinafter "the Act").

On the first point, I was of the view that as para. (a) of subsection (1) of s. 254 of the Code specifically requires the chargee to specify only the breach in question when serving the chargor the notice in Form 16D and does not require him to enclose the respective charges,

I found it totally devoid of merit. The defendant at para. 7(a) of his affidavit-in-reply dated 19 December 1984 had maintained that the Form 16D notice as regards Grant 6032 Lot 59 Seksyen 5 Kota Bharu had not been served on him and although the plaintiff had failed to enclose that particular Form 16D notice in their application, I was satisfied that they had done so at the time of service in view of para. 2 of their supplementary affidavit dated 7 September 1985 which annexed that particular notice and which stated that the Form 16D notices for both lands had in fact been sent under the same postal cover by registered post to the service station belonging to the defendant which fact had not been disputed by the defendant.

As regards Counsel's submission that there had been no valid service as there was no personal service on the defendant, I had to reject this argument in view of para. (d) of sub-section (1) of s. 431 of the Code which clearly provides that service may be made by registered post. With regard to the calculation of interest, I was of the opinion that it was in order considering para. 5 of plaintiff's supplementary affidavit dated 11 August 1985.

On the question of laches, sub-section (1) of s. 21 of the Act states that "no action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortage or charge ...., after the expiration of twelve years from the date when the right to receive the money accrued". Counsel for the defendant submitted that the right to receive the money accured at the time the charges were executed and Counsel for the plaintiff argued that it accured when the Form 16D notices were sent to the defendant and the defendant failed to pay. Section 26 of the Act specifically states that the right of an action to recover land or to enforce a mortgage or charge in respect of land is deemed to have accrued on and not before the date of the acknowledgment or last payment. It is clear from the plaintiff's affidavit dated 12 November 1984 that although the charges were executed in 1971 and 1972, the defendant's failure to repay the plaintiff began only from 7 April 1984. To my mind, the period of limitation would run only from that date and not from the date of the execution of the charges or the date the Form 16D notices were sent. To agree with learned Counsel for the defendant's contention would mean that a chargor could dutifully keep up his payments for a period of twelve years and default thereafter and the chargee would then have no cause of action against him at all whatsoever. As regards the question of interest, the same reasoning applies in view of proviso (b) to sub-section (5) of s. 21 of the Act which states that interest shall not be deemed to become due before the right to receive the principal sum of money has accrued or is deemed to have accrued.

In the circumstances, I granted the order in terms of the plaintiff's application.

Also found at [1988] 2 CLJ 185